

ORIGINAL



0000073616

LAW OFFICES OF
VINGELLI & ERRICO

BANK OF AMERICA PLAZA
33 NORTH STONE AVENUE
SUITE 1800

TUCSON, ARIZONA 85701

TELEPHONE (520) 791-0900

Michael J. Vingelli

State Bar No. 002899, PCC No. 59684

Attorneys for

Respondent

RECEIVED

2007 JUN -4 A 11:43

AZ CORP COMMISSION
DOCKET CONTROL

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

Arizona Corporation Commission
DOCKETED

JUN -4 2007

DOCKETED BY

nr

MIKE GLEASON, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

In the matter of:

) DOCKET NO. S-20520A-07-0155

LEONARD FRANCIS ALCARO (a/k/a "LENNY
ALCARO"), and

) **MEMORANDUM OF LAW IN**

MARY BRIGID LAVIN ALCARO, husband and
wife,

) **SUPPORT OF MOTION TO DISMISS**

1140 West San Lucas Circle,
Tucson, Arizona 85704

Respondents.

COMES NOW, the Respondent, MARY BRIGID LAVIN ALCARO, and files this

motion to dismiss and memorandum because she, nor the marital community, are liable for the
criminal acts of one spouse, as supported by the attached memorandum of points and
authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Legal Analysis

Subsection VIII of the Notice of Opportunity for Hearing Regarding Proposed Order to
Cease and Desist Order, for Restitution, for Administrative Penalties and for Other Affirmative

1
2 Action states as a requested relief an "order that the marital community of RESPONDENT
3 ALCARO and RESPONDENT MARY BRIGID LAVIN ALCARO be subject to any order of
4 restitution, rescission, administrative penalties, or other appropriate affirmative action pursuant
5 to A.R.S. § 25-215." Here there are no facts to support Respondent Mary Brigid Lavin Alcaro's
6 involvement in the alleged securities fraud. Further, the law is very clear that if one spouse
7 commits a crime, the marital community is not liable for the damages or restitution.

8
9 In *Cosper v. Valley Bank*, 28 Ariz. 373, 237 P. 175 (1925) it was inferentially
10 recognized that a fine for a crime committed by the husband, not committed in connection with
11 the management of community property, is a separate debt. *Shaw v. Greer*, 67 Ariz. 230, 194
12 P.2d 434 (1948). In *Newbury v. Remington*, 184 Wash. 665, 52 P.2d 312 (1935), it was held
13 that the marital community was not liable for an assault committed by a husband motorist who
14 was angered because he thought plaintiff ran through an arterial highway without stopping.
15 *Shaw, supra*. The Court reasoned that the malicious tort committed by these defendants, not
16 committed in connection with the management of the community property, may be likened to a
17 separate crime of one of the spouses. *Id.* Likening the commission of a crime to the
18 commission of a tort, the Court in *Shaw* determined that a "malicious tort committed by one of
19 the spouses without the knowledge, consent, or ratification of the other and not resulting in a
20 benefit to the community is not a community obligation, it follows that the debt sued on was the
21 separate obligation of the defendant husbands and that the order quashing the writs of
22 garnishment levied to collect salaries owing to the community was correctly entered." *Id.* The
23 controlling question, in determining liability of the marital community for the tort of the spouse,
24 is whether the tort is calculated to be, is done for, or results in a benefit to the community or is
25 committed in the prosecution of community business. *Howe v. Haught*, 11 Ariz. App. 98, 462
26 P.2d 395 (1970) (citing *Brink v. Griffith*, 65 Wash.2d 253, 396 P.2d 793(1964)). It follows from

1
2 the reasoning in *Shaw* and *Howe* that when one spouse commits a crime without the knowledge,
3 consent, or ratification of the other spouse, and such a crime is not for the purpose of benefiting
4 the community and does not benefit the community, and such a crime was not committed during
5 the management of the community, the damages flowing from the crime cannot be a debt of the
6 community, but rather must be the separate debt of the spouse who committed the crime. *See*
7 *Cadwell v. Cadwell*, 128 Ariz. 460, 616 P.2d 920 (1980). Therefore, the burden is on the state
8 to produce evidence to prove that the community benefited from the alleged criminal acts in
9 question before the community and Mrs. Alcaro are held responsible for restitution.
10

11 In the instant case, there are absolutely no allegations in the Notice of Hearing against
12 Mary Alcaro personally. There is only a general allegation that Leonard Alcaro and Mary
13 Alcaro were acting for their own benefit, and for the benefit or furtherance of the marital
14 community. There are no facts offered by the Commission to support that general allegations.
15 The Commission is being asked to rely solely upon the fact that Respondents Alcaro and Mary
16 Brigid Lavin Alcaro are married. While the courts have created a strong presumption that the
17 marital community is liable for debts incurred by one of its members, and a rebuttable
18 presumption that the marital community is liable for the intentional torts of one of its members,
19 the courts have not created such a presumption regarding damages or restitution flowing from
20 criminal acts or securities law violations committed by one of the members of a marital
21 community.
22

23 The Commission's entire Notice of Hearing consists of allegations only as to affirmative
24 acts thought to be committed by Respondent Leonard Alcaro. The Notice of Hearing alleges
25 that Leonard Alcaro was solely responsible for these crimes and the fruits thereof by stating
26 under General Allegations paragraph 31 and under Violation of A.R.S. § 44-1991 paragraph
39(A), that Alcaro deposited investor funds into his personal bank account and, in some

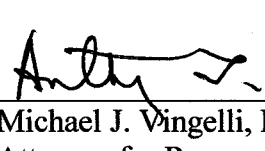
1
2 instances, used investor funds to make payments to other investors, or for his personal use. The
3 Commission has not alleged any factual basis for collecting restitution from the marital
4 community. Respondent Mary Brigid Lavin Alcaro is not alleged to have committed any crime
5 pr securities violation, is not alleged to have benefited from any crime or securities violation, is
6 not alleged to have knowledge of a crime or a securities violation, and is not alleged to be the
7 motive for any crime or securities violation. Further, the Notice of Hearing affirmatively
8 alleges that Respondent Leonard Alcaro committed financial crimes and that he personally
9 benefited from those crimes by depositing monies into his personal bank account and using such
10 funds for his personal use. Moreover, Respondent Alcaro's alleged criminal activities were not
11 committed during the management of the community or for the benefit of the marital
12 community as required by Arizona law.

13
14 **Conclusion**

15 For the foregoing reasons, the marital community and Mary Alcaro are not liable for any
16 criminal actions or securities violations alleged to have been committed by Respondent Leonard
17 Alcaro, and therefore, this motion to dismiss as to the request for restitution and the related
18 issues should be granted.
19

20 RESPECTFULLY submitted this 1 day of June, 2007.
21
22

23 **VINGELLI & ERRICO**

24
25 
26 Michael J. Vingelli, Esq.
Attorney for Respondent, Mary Brigid Lavin Alcaro

LAW OFFICES OF
VINGELLI & ERRICO
BANK OF AMERICA PLAZA
33 NORTH STONE AVENUE
SUITE 1800
TUCSON, ARIZONA 85701
TELEPHONE (520) 791-0900

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Original of the foregoing
mailed this 1 day
of June, 2007 to:

Docket Control
Arizona Corporation Commission
1200 W. Washington
Phoenix, Arizona 85007

Copy of the foregoing
mailed this 1 day
of June, 2007 to:

Mike Dailey
Arizona Corporation Commission
1300 W. Washington
3rd Floor
Phoenix, Arizona 85007